APPELLATE CRIMINAL.

Before Suhrawardy and Costello JJ.

1930

May 22, 23.

RAN MAMUD

v.

EMPEROR.*

Witness—Production and examination of a witness for the defence, when a matter of right—Duties of the Crown, when it prosecutes any one—Discretion of summoning witnesses cited by the defence, in whom vests—When a legal right is denied, if any question of prejudice arises—Code of Criminal Procedure (Act V of 1898), ss. 211, 216, 217, 257, 291.

In a sessions case, when a list of witnesses is filed by the defence before the committing magistrate, the witnesses named therein must be summoned and made to be present at the trial and if they are not present, their attendance has to be secured by some means by the Crown. In a Crown prosecution, the object is not to secure the conviction of the accused, but to see that proper justice is done, that the guilty may not escape unpunished and that the innocent may not be unjustly punished. The Crown accordingly takes upon itself the charge of securing the attendance of all the witnesses for the prosecution as well as for the defence. This procedure is well-founded on reason. The accused is entitled to it as of right and the examination of such witness cannot be refused merely on the ground that it would be inconvenient to adjourn the case in order to secure the attendance of a witness.

The discretion of not summoning any witness mentioned in the list given to the magistrate by the accused vests in the magistrate and not in the Sessions Judge.

When a legal right is denied the question of prejudice hardly arises.

CRIMINAL APPEAL by Ran Mamud and four other accused persons.

The material facts appear from the judgment of the Court.

Prabodhchandra Chatterji (with him *Radhikaranjan Guha*) for the appellant. In this case one of the defence witnesses was named in the list of witnesses before the committing magistrate. As a matter of fact, the said witness was summoned as a defence witness in the court of session. The accused, therefore, had a right to have him produced and examined in the sessions court and the learned

*Criminal Appeal, No. 63 of 1930, against the order of B. K. Datta, Additional Sessions Judge of Rangpur, dated Nov. 18, 1929.

judge committed an error of law in refusing to enforce his attendance. The committing magistrate might have refused to summon him under section 216 of the Code of Criminal Procedure. He not having done so, the Sessions Judge had no discretion in the matter. (Sections 216, 217, 257 and 291 of the Criminal Procedure Code.) It was not competent for the Sessions Judge to dispense with his attendance on the ground that the witness was unimportant or unnecessary or that his examination would delay the proceedings. The accused had no duty to produce him, but it was the duty of the Crown to see to his attendance in court. When such a right is denied, it is obviously to the prejudice of an accused person. It is difficult to judge what value the jury would have put upon his evidence.

The Deputy Legal Remembrancer, Khundkar, for the Crown. The circumstances of this case clearly indicate that the several applications made by the accused were all *malâ fide*. The sole purpose was to take advantage of the absence of this witness for an unavoidable reason and to have the case adjourned, thereby delaying the trial. Since the mention of the name of the list of witnesses before the committing magistrate no step whatsoever was taken to see that he was produced. This shows that the witness was unimportant. The real intention of the accused was clear to the learned judge and he was right in rejecting the applications as *malâ fide*. The accused has not been able to show that any prejudice has been done. The verdict of the jury should not be set aside.

Cur. adv. vult.

SUHRAWARDY AND COSTELLO JJ. This is an appeal by 5 persons against their conviction and sentence by the Additional Sessions Judge of Rangpur under sections 147, 148 and of the first appellant under section 304, paragraph 2, of the Indian Penal Code also. Mr. Chatterji has raised several grounds in appeal, but it is enough, for our present purpose, to

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refer to one of them and that is that the learned Sessions Judge did not give the defence an opportunity of examining one of the witnesses, whom the appellants had named in the list of witnesses submitted by them to the committing magistrate. It appears that the appellants named one Jadunath Ghosh as a witness for the defence in the list filed by them before the committing magistrate. The trial began on the 12th November, 1929. We do not know if he was present on that day, but he was not apparently present on the 14th November. The appellants made an application to the learned judge that the witness was not in attendance on that day and it was intimated that, on account of the illness of his son-in-law, he had gone over to Rajshahi. It was prayed that a wire might be sent directing him to appear by the 16th instant at the latest and in the event of such witness not coming up, it was said that it might be necessary for the defence to ask for an adjournment. On this application, the order passed by the learned judge was: "The case is going to be closed by to-morrow and it "cannot be postponed. The application is rejected." On the following day, that is on the 15th, another petition was put in on behalf of the defence, for calling this witness and some other persons as witnesses for the defence. The learned Sessions Judge passed the following order upon it: "Heard pleaders for both "sides. The application does not appear to be *bonâ* "*fide*. The case cannot be postponed. The petition "is rejected." In the order-sheet of the 14th November, the following order appears to be recorded: "The defence puts in another petition praying for "sending a wire to one Jadunath Ghosh, who has "been cited and summoned as a defence witness, "directing him to appear here by Saturday the 16th "instant. He is in the Rajshahi district. The case "is going to be closed by to-morrow and it cannot be "postponed. The application is rejected." On the 15th, the following order was recorded in the order-sheet: "At this stage the defence pleader puts in

"an application stating that some of the defence "witnesses have not turned up, though duly summoned "and prays for adjourning the case to a convenient "date. Heard pleaders for both sides. The "application does not appear to be *bonâ fide*. The "case cannot be postponed. The petition is "rejected." It appears that several other applications were filed on behalf of the defence, relating to the admissibility of documents, regarding record of evidence and other matters. We cannot in sufficiently strong language deprecate the practice adopted in *mofussil* to interfere with the smooth course of the trial by means of obstructive measures apparently for the purpose of making a case for appeal, such as filing applications, which in most cases contain baseless insinuations and are calculated not to further the interest of justice, but to retard its progress and to irritate the court. But that is beside the point. What we have to see in this case is whether the accused are entitled in law to have the witness Jadunath Ghosh examined on behalf of the defence. When a charge is framed against the accused by the magistrate holding an enquiry preliminary to commitment the accused shall be required to furnish a list of the persons whom he or they desires or desire to summon to give evidence in the trial and the magistrate may, in his discretion, allow the accused to give in any further list of witnesses under section 211 of the Code of Criminal Procedure. When such a list of witnesses has been submitted by the accused, the magistrate shall summon such of the witnesses included in the list as have not appeared before himself, to appear before the court to which the accused had been committed. Section 216. As to the witnesses who have appeared before the magistrate, they must execute bonds to be in attendance when called upon at the Court of Sessions under section 217. The accused is entitled, as of right, to have the witnesses named by him in the list delivered to the committing magistrate examined on his behalf.

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Section 291. It will thus appear that the intention of the legislature is to cast on the Crown the charge of securing attendance of witnesses whom the accused intimates to examine on his behalf at the trial. This procedure is well-founded on reason. In a Crown prosecution, the object is not to secure the conviction of the accused, but to see that proper justice is done, that the guilty may not escape unpunished and that the innocent may not be unjustly punished. The Crown, accordingly, takes upon itself the charge of securing the attendance of all the witnesses for the prosecution as well as for the defence. It will be seen that the procedure, even in warrant cases before a magistrate, is that the accused has to summon his own witnesses and see to their attendance. Section 257 of the Criminal Procedure Code. But in a sessions case, when the list is filed before the magistrate, the witnesses named therein must be summoned and made to be present at the trial and if they are not present, their attendance has to be secured by some means by the Crown. The accused has no hand in securing the attendance of witnesses by means of processes of court. It should be noted that the discretion of not summoning any witness mentioned in the list submitted to the magistrate by the accused vests in the magistrate and not in the Sessions Judge. Section 216, proviso. I am, accordingly, of opinion that the learned Sessions Judge was not justified in refusing to help the accused in securing the attendance of their witnesses. The right to examine the witnesses named by the accused before the committing magistrate and who have been summoned to be in attendance before the Court of Sessions is recognised by law under section 291 of the Criminal Procedure Code. The examination of such witness cannot be refused, merely on the ground that it would be inconvenient to adjourn the case in order to secure the attendance of the witness. An accused person has the right to defend himself and, in order to support his defence, he is entitled to cite such witnesses as he thinks will

help him. Undoubtedly, it is very inconvenient to all parties concerned, including the jurors, to adjourn a case in the midst of a trial and it is, therefore, proper that, before a case commences, the Sessions Judge should ascertain if the case is ready, that is, if the witnesses on both sides are in attendance. It may be noted that the trial was actually finished on the 18th November.

Though, where a legal right is denied, the question of prejudice hardly arises, we cannot say that, in the circumstances of this case, the accused cannot legitimately complain of being prejudiced in their defence. The occurrence is admitted by the accused, though the occurrence is placed on a different plot. But they also claim the plot where the occurrence is said to have taken place by the prosecution, as belonging to them. The question between the parties was as to whether the *char* was formed 17 years ago according to the complainant or recently according to the defence, the defence case being that, after its recent formation, it was settled with them by the landlord. The witness Jadunath Ghosh is said to be the *nâib* of one of the landlords and he was asked to prove the settlement with the accused. Taking all these circumstances into consideration, we think that the objection taken by the accused must be given effect to and, that this appeal should be allowed. We, accordingly, set aside the conviction and sentence of the appellants and direct that they be retried by another Judge with a fresh jury. The accused Ran Mamud will remain in custody until further orders by the Sessions Judge. The other accused persons are directed to surrender to their bail before the Judge and abide by his order.

Appeal allowed, retrial ordered.

A. C. R. C.